

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3059

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MARVIN J. JENSEN,

Plaintiff-Respondent,

v.

HORST JOSELLIS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

VERGERONT, J.¹ Horst Josellis appeals from a judgment in favor of Marvin Jensen in the amount of \$375 plus costs for damage to vegetation on Jensen's property caused by Josellis's cattle. Josellis contends that: (1) the trial court erroneously denied his motion for a more definite statement in Jensen's complaint; (2) there was insufficient evidence that his cattle were on Jensen's property on the date the damage occurred; (3) the trial court erred in not admitting a map showing the property of both parties and the property lines

¹ This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

and fence lines; (4) Jensen is prohibited by statute from recovering for damage caused by Josellis's cattle because Jensen did not give Josellis notice of the deficiency in the fence between the two properties; and (5) the damages were excessive. We reject each of these contentions and affirm the judgment.

At the start of the trial on this small claims action, Josellis moved for a more definite statement, arguing that Jensen's complaint did not provide any details regarding when and where Josellis's cattle damaged his property. The trial court denied the motion as untimely. The trial court did not erroneously exercise its discretion in denying the motion. The complaint was filed on August 11, 1995, and explained the date of the occurrence, what occurred and the damages caused. A pretrial was scheduled and took place on September 8, 1995, and the trial was scheduled for September 19, 1995. Josellis was notified in advance by mail of the pretrial and by personal service of the trial. The court could reasonably decide that Josellis should have requested a more definite statement before the date of trial.

At trial, Jensen testified that when he woke up at approximately 5:00 a.m. on the morning of July 25, 1995, there were eight or nine cattle on his lawn and in the corn field behind his house on his property. Jensen tried to chase them away and got some of them out, but a bull came around the corner of the house and he had to get out of the way of the bull. The cattle had come from Josellis's property and were Josellis's cattle. The cattle eventually went back to Josellis's property. The cattle got on Jensen's property because there is only a one-wire electric fence on a portion of the property line with posts from twenty to thirty feet apart, and the wire is drooped between the posts. Jensen did not call Josellis because Josellis was standing right there on his lawn that morning. Jensen testified that three trees were damaged, a small lilac bush, some old lilac bushes and other plants, including iris. He testified that the value of the three trees was \$100 each; the value of the lilac bush was \$50; and the value of the other plants was \$50. Jensen also testified that the cattle caused damage to the lawn and corn crop, which was not his but belonged to the person who rented land from him.

Deputy Sheriff Louise Crisman also testified. She testified that Jensen called the sheriff's office on the morning of July 25, 1995. She went out to his property early in the afternoon on that day and took photographs. One of the photographs showed a tree with a number of branches broken off and cow

manure in front of the tree. Another photograph showed lilac bushes with green branches lying on the ground. Another showed iris plants with broken leaves on the ground. Crisman testified that three trees were damaged and that the manure she saw in front of the photographed tree was fresh. She observed cattle footprints on the yard.

Josellis testified. He denied that his cattle were on Jensen's property on the morning of July 25 and denied that he was on Jensen's property that morning. He testified that when he got up that morning, at approximately 5:30 a.m., the cows were behind the barn and he put them in the barn.

The trial court found that Josellis's cattle were on Jensen's property on the morning of July 25. We do not overturn the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. There is sufficient evidence to support the trial court's finding that Josellis's cattle were on Jensen's property on the morning of July 25. The conflict in the testimony of Jensen and Josellis on this point presented an issue of credibility, which was for the trial court to resolve. See *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977).

The trial court also determined that Josellis was liable to Jensen for damage to Jensen's trees, shrubs and other plants. Although the court did not make an explicit finding that Josellis's cattle caused the damage that Jensen complained of, this is implicit in the trial court's finding of liability. See *Schneller v. St. Mary's Hosp. Medical Ctr.*, 162 Wis.2d 296, 311-12, 470 N.W.2d 873, 879 (1991) (trial court's finding of fact may be implicit from its ruling). The testimony of Jensen, the deputy sheriff, and the photographs support a finding that the cattle on Jensen's property on the morning of July 25 caused damage to trees, shrubs and plants.

Josellis contends on appeal that he wanted to introduce a map showing the fence between the properties and to testify concerning the deficiency in the portion of the fence that he claims is Jensen's responsibility. However, the court limited Josellis's testimony on the condition of the fence, whose responsibility it was to maintain certain portions of the fence and

whether the fencing complied with the statutory requirements.² The court stated that a map of the fence, which Josellis mentioned in his testimony, was not relevant. The court explained that since Josellis had denied that his cattle were on Jensen's property on the morning of July 25, these issues concerning the fence were not relevant.

A court conducting a small claims trial shall, with certain exceptions not applicable here, admit all evidence "having reasonable probative value, but may exclude irrelevant ... evidence." Section 799.209(2), STATS. We will not reverse the trial court's refusal to admit evidence on the ground of irrelevancy unless the court has erroneously exercised its discretion. See *Chart v. General Motors Corp.*, 80 Wis.2d 91, 102, 258 N.W.2d 680, 684 (1977).

We conclude the trial court properly exercised its discretion in limiting this testimony based on relevancy. The court could reasonably conclude that evidence concerning the legality of, responsibility for and condition of the fence at various portions along the property line did not have reasonable probative value. Josellis's defense was not based on an assertion that the cattle could not have gotten through the fence at the location at which Jensen testified they came through. His defense was that his cattle were not on Jensen's property on that morning. The evidence he wished to introduce concerning the fence did not have a tendency to make it more or less probable that his cattle were or were not on Jensen's property on that morning. See § 904.01, STATS. ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Josellis contends that Jensen could not recover because he did not notify Josellis of any deficiency in Josellis's fence. Josellis does not provide a statutory or case cite for this proposition. It does not appear that Josellis raised this argument before the trial court. We also note that this contention is inconsistent both with Josellis's defense before the trial court--that his cattle were not on Jensen's property--and with other contentions in his appellate brief--that if his cattle did get through the fence, it was the portion of the fence Jensen

² Chapter 90, STATS., regulates partition fences between adjoining lands used and occupied for farming or grazing purposes.

was responsible for maintaining. For these reasons, we decline to consider this issue on appeal. See *Wengerd v. Rinehart*, 114 Wis.2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983) (appellate courts generally do not consider issues raised for the first time on appeal).

Josellis claims the damages are excessive. He relies on § 799.209(2), STATS., which provides that "an essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence." Josellis argues that the testimony on damages was based solely on Jensen's oral hearsay statement.

The trial court asked Jensen how he arrived at the figure of \$100 for each of the three trees. Jensen answered, "I just--we talked to the--at Reedsburg, they have a florist place where they sell plants and like that, and that's where I got that from." On cross-examination, Josellis asked Jensen whether he had any receipts. Jensen stated he had them at home but did not know where. However, Jensen also stated that his figures were based on those receipts and that the value was probably more than the receipts showed. "A tree of that size, if you [were] to price a tree of the size of that one there that was damaged ... it would be up around Four Hundred Dollars, or better." Josellis asked Jensen whether he had hired a professional to give a damage estimate and Jensen stated no. Josellis did not submit any evidence on the amount of damages except his testimony that, based on his prior experience, the amounts Jensen testified to were too high. Josellis did not testify regarding what he thought was a reasonable value. In addition to Jensen's testimony, the court had before it the photographs taken by the deputy sheriff.

The trial court awarded no damages concerning the lawn and the corn because there was no evidence provided as to the amount of those damages. It found the damage to the three trees to be in the amount of \$100 each, and to one lilac, \$50. It found that \$50 for damage to other plants, including some iris, was excessive and found that \$25 was a reasonable value.

Josellis did not object to any of Jensen's testimony as hearsay. But that is not necessary in a small claims proceeding because § 799.209(2), STATS., waives the rules of evidence in small claims proceedings and renders hearsay admissible if relevant. *Scholten Pattern Works, Inc. v. Roadway Express, Inc.*,

152 Wis.2d 253, 259, 448 N.W.2d 670, 672 (Ct. App. 1989). The issue is whether the evidence is sufficient to sustain the trial court's determination on damages, given the fact that § 799.209(2) requires more than "oral hearsay" as a basis for an essential finding. See *id.* at 258, 448 N.W.2d at 672.

The basis for Jensen's testimony on damages is not clear. A portion of his testimony could be interpreted as stating that the \$100 figure was based on what a florist told him--clearly "oral hearsay." But that same testimony could also be interpreted as stating that he bought the trees at the florist and the actual purchase price was the basis for his testimony, particularly in view of his later testimony that the figures were based on the receipts. If the receipts had refreshed his recollection about what he paid, his testimony of what he paid is not hearsay. See *State v. Wind*, 60 Wis.2d 267, 274, 208 N.W.2d 357, 362 (1973) (if witness can look at writing which refreshes his memory as to the facts and he can then testify from his independent recollection, his testimony, and not the writing, is admitted in evidence; there is no hearsay problem in admitting witness's testimony). The photographs showing the damaged tree, bush and plants were not hearsay because of the foundation laid by the deputy sheriff who took the photographs. Given the trial court's better position from which to interpret the oral testimony, and the fact that it also had the photographs, we are not persuaded that the determination of the amount of damages was based solely on oral hearsay.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.